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CHEVRON U.S.A. INC., PETITIONER v.
MARIO ECHAZABAL, RESPONDENT
ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PHYSICIANS WHO TEACH
OCCUPATIONAL MEDICINE, **Dr. Mark Cullen,**
Yale University Medical School Department of
Occupational and Environmental Medicine and
Dr. Tee L Guidotti, The George Washington University
Department of Occupational and Environmental Health
AMICUS CURIAE
SUPPORTING NEITHER PARTY

MOTION REQUESTING LEAVE TO FILE BRIEF OUT OF TIME AND
BRIEF AMICUS CURIAE
REQUESTING INVALIDATION OF EEOC REGULATIONS AND WRIT OF MANDAMUS TO THE SECRETARY OF LABOR FOR OSHA

Ilise L Feitshans JD and ScM , *Counsel of Record*
Work Health and Survival Project
The George Washington University
School of Public Health Services
The Warwick Building
Washington, D.C. 20530-0001
856 428 0605

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2. Whether the Equal Employment Opportunity Commission (EEOC) in administering ADA has the requisite legislative mandate and expertise to determine that an employee who is at risk of harm from workplace exposures is a "direct threat of harm to oneself" although the US Congress had already spoken about science matters in other laws and delegated authority to promulgate standards regulating workplace health risks under OSH Act, two decades before it wrote the ADA.

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INTEREST OF *AMICUS CURIAE*

Dr. Mark Cullen, Yale University Medical School, Department of Occupational and Environmental Medicine and Dr. Tee L Guidotti, The George Washington University Department of Occupational and Environmental Health enjoy the unique expertise required to train physicians who will ultimately administer and decide how to implement the decisions of this Court in workplace medical practice that will apply legal principles prohibiting discrimination against the disabled. They have each written several books and articles that are well respected in this field. As professors of occupational medicine, Amici have each lectured and engaged in clinical practice in occupational health for over two decades. Amici are uniquely positioned to speak with expertise and objectivity; looking to the public good and feasibility of implementing Americans With Disabilities Act (ADA) goals from the standpoint of students, former students and prospective students. Amici therefore express their concern that excessive attention to the role of legal determinations of discrimination, required of occupational physicians in the field, without clarification of the importance if not primacy of attention to risk involved in workplace exposures, may lose sight of the nation's goals, articulated by the US Congress in the Occupational Safety and Health Act (OSH Act) of 1970 29 USC 651 et seq and the ACOEM Code of Ethics [Reprinted in Appendix 1]that govern their work.

REQUEST TO FILE BRIEF AMICUS CURIAE PURSUANT TO RULE 37 of THIS COURT

A blanket consent to Briefs Amicus Curiae was filed by both parties. Leave is requested to file under Rule 37 in order to amplify points made by Amicus Curaie American College of Occupational and Environmental Medicine (ACOEM). Amicus here expresses concurrence with the concerns raised ACOEM. ACOEM correctly raised a red flag about the pivotal role of occupational physicians who make on the spot determinations that may later be reviewed in post-hoc litigation while they endeavor to address and cure occupational illness. Without proporting to represent the views or opinions of ACOEM the Amicus here wish to underscore certain points made and to request of this Court that jurisdiction for matters of occupational health be restored to the appropriate agencies for administering occupational health laws and regulations.

- ***MOTION TO REQUEST LEAVE FOR FILING OUT OF TIME DUE TO EXTRAORDINARY CIRCUMSTANCES***

Amici here request leave to file this Brief out of time because the extraordinary circumstances of this point in litigation raise subtle issues of occupational medicine practice that may benefit from insights gleaned from their knowledge and experience. Their training and professional endeavors involve application of an unusual confluence of information from a variety of medical, scientific and technical systems whose outcomes have an impact on the validity of decisions that will test the mettle of physicians who seek to synthesize two essential but divergent goals of social policy. The principles discussed before this Court in the matter at Bar will actually be applied in daily life by doctors, whose professional judgement will later be reviewed to determine whether their work comports with both: notions of occupational health and discrimination prevention under law. Physicians who teach others how to ethically and accurately examine the causes and methods for preventing occupational injury therefore have a special perspective of rarified knowledge to contribute to this discourse, but were not moved to speak until they read the ACOEM brief , in which they concur in part. They also wish to elaborate on subtle points.

Counsel of Record is aware of the lateness of this filing and therefore wishes to underscore that Amici are not litigants in this case and therefore have no personal or financial interest in this case or in its specific outcome. They simply hope to refine public understanding of certain technical points for the benefit of improving public health policies. Amici do not request any waiver of statutes of limitations for any cause of action that would be time barred; they simply request that at this technically difficult moment in the decisional process, their information regarding technical matters be heard.

Furthermore, it could be argued that any prior comment by Amici regarding this case, before the maturation of the discourse to its present level, would have been premature. Occupational physicians have often been inappropriately accused of acting as simply a rubber stamp for employer desires to remove people with expensive or complex illnesses from arguably risky working conditions. At the same time, a fundamental tenet of occupational medicine requires each physician to prevent harm, exemplified by ACOEM's Code of Ethics [Appendix 1].Amici hope their sincere concern for the public good will dispel myths about disability and will engender public trust for their

profession.

ADA has become the new mantra for occupational and environmental medicine practice, because it has changed the demographics of the USA's working population by making it illegal to exclude applicants who have disability or to ask about previous injury or illness experience unless one can reasonably demonstrate that such information was not used to discriminate in employment or placement decisionmaking. Cause of injury does not matter when applying, during pre-employment screening or medical screening process from the standpoint of ADA, but it may be at times controlling for specific workplace health outcomes. Under current practices, the determinations of whether any job has too high a risk to be acceptable for any applicant's health is a difficult question of medical ethics, faced by many occupational physicians daily; on the other hand, myths and fears that are not based in sound medical evidence can keep employable citizens unemployed. Because job hazards vary across worksites and susceptibility, science medicine and genomic information increasingly suggests, risk may vary greatly from one individual to the next without regard to prior health status. Occupational physicians who sign off on work assignments daily balance both sets of concerns: respecting genuine risks and teasing apart myths and fears about potential harm from the circumstances in a workplace. Thus, the question whether a job is acceptably safe or too dangerous given specific risks to one individual involves complex evaluation, best made by physicians, following OSHA regulations.

In such matters, the best medical minds may disagree, but none can escape their awkward position that places them on the horns of a professional dilemma: their medical opinion regarding the match between job applicant and placement in a particular assignment must be reasonable and justified when taking into account not only the social need for preventing and ending workplace discrimination against disabled people, but also by examining scientific and medical parameters such as ambient exposures in the work environment; as well as job description, industrial category and individual variations in the response to risk. When the confluence of job hazard and individual risk is too great for one to ethically advise that a person accept the work assignment, the occupational physician who signs off risks malpractice liability and fosters non-compliance with health laws; and the occupational physician who signs off on a refusal to hire or place the same person may unwittingly become a link in the chain of an

employer's pattern of practice of discrimination. Therefore, acting with professional integrity for those who practice occupational medicine is fraught with personal and professional liability where there is no safe or neutral ground upon which they can confidently rest their opinion.

In sum, because of the sophistication and complexity of these issues as they have ultimately unfolded in this matter, Amici who are practicing physicians in academia, without legal training and without scientific concern for any specific outcome feel their unique understanding and experience governing the daily practice of these issues should, for the public good, be made available to enlighten the public and inform this Court of potential ramifications reflected in their concerns. It is therefore necessary and appropriate that Amici add their information to the discourse at this time and respectfully request that this Brief be accepted.

QUESTIONS PRESENTED

Whether the "direct threat" defense available to employers under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but pose no risk to the health or safety of other people in the workplace

Whether the Equal Employment Opportunity Commission (EEOC) in administering ADA has the requisite legislative mandate and expertise to determine that an employee who is at risk of harm from workplace exposures is a "direct threat of harm to oneself" although the US Congress had already spoken about science matters in other laws and delegated authority to promulgate standards regulating workplace health risks under OSH Act, two decades before it wrote the ADA.

SUMMARY OF ARGUMENT

Two powerful drivers in contemporary social policy are on a collision course: health law and discrimination law. Both drivers are the source of remedial statutes, designed by the US Congress to prevent and end evil that threatens to rot the core of society, if left unchecked. Discrimination law seeks to overcome and replace the barriers to human achievement of individual potential that are rooted in myths, stigma and prejudice about the immutable characteristics of individuals. Health law seeks protect the well-being of individuals,

even when that requires a prospective evaluation of risk. Risk, however, is inherently unequal to different individuals who may be confronted with the same set of tasks. Furthermore, as scientists study in greater detail the relationship between toxicology and genetics, pharmacology and a variety of host-environmental interactions, it is clear that risk analysis can become more complex but many risks nonetheless cluster around the identical characteristics that are the red flag for concerns of discrimination under law: science finds that human risk differs by race, ethnicity, national origin, age, health status or functional disability, and sex.

Thus, the social desire to remove or overcome barriers to discrimination must, at times, yield when individual scrutiny of a patient's needs reveals natural barriers to health, in order to preserve life and prevent human suffering, which is an ultimate obstacle to human achievement and civilization's survival.

This Court has recently stated in *Toyota v Williams*__ US__ (2002) 2002 WL 15402(2002) that special protections accorded to disabled individuals under the Americans With Disabilities Act (ADA) require the protected individual to demonstrate "substantial impairment" in the performance of one or more major life activities. The Court so determined, without commenting on the attendant issues of risk that may color a disabled individual's ability to perform certain tasks. Yet, risk is endemic in the human condition and more importantly, no set of tasks, at work or elsewhere, can be performed without any risk to oneself. Sound principles of industrial hygiene and occupational medicine will, on occasion, dictate that individuals refrain from engaging in an activity due to risk, regardless whether that person is healthy or disabled. The fundamental social goal of protecting human life from risk was addressed by the US Congress two decades before the writing of the ADA, as codified in the Occupational Safety and Health Act of 1970 (OSH Act). Thus, questions regarding the relative risk of prospective harm for individuals in a given workplace who are not substantially impaired and may be otherwise qualified for employment is subject to OSH Act jurisdiction, not ADA. This Court cannot allow overzealous desire to prevent discrimination to render politically incorrect long-standing health values that must be promoted in order to ensure the survival of our society. Therefore the EEOC regulations concerning the "threat of harm" to oneself are the ***ultra vires product of an agency that has exceeded its delegated authority***.Said regulations therefore are invalid.

ARGUMENT

I. Discrimination Law Can Not Adequately Address the Problems of Risk To Oneself At Work Inherent in Human Activity, Regardless of Disability

In the case at bar, this Court grapples with an ancient and unresolved human conundrum that goes to the essence of work, health and survival of human society. The Americans With Disabilities Act (ADA) of 1990 was written by the U.S. Congress to prevent the harms, caused by discrimination in the workplace, that arise because of unfounded stereotypes about disability and the nature of illness in society in general. Neither ADA nor its antecedent statute, Title VII was designed to address issues of health and welfare. Cases that have tested the limits of such jurisdiction have allowed workers to continue their exposure to risks in the workplace, without regard to the Occupational Safety and Health Act's health and welfare rationale. This was noted by the Ninth Circuit, which cited with approval the concept that "danger to a woman herself does not justify discrimination" *Echazabal v Chevron*, 226 F3d 1063 (2000) citing *IUAW v Johnson Controls*, 499 US 202 (1991) citing *Dothard v. Rawlinson* 433 U.S. 321, at 328 (1977).

The Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 et seq., with respect to private employers and is authorized to issue regulations under that Title. This case concerns whether Title I authorizes an affirmative defense for cases in which an individual will pose a direct threat to the health or safety of that individual. The Ninth Circuit Court of Appeals in this case invalidated the EEOC regulations that recognized this affirmative defense. Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). A "qualified individual with a disability" is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). ADA states "[i]t may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation."

42 U.S.C. 12113(a).

The US Supreme Court case *Toyota v Williams* ___ US ___ (2002) 2002 WL 15402(2002) held that merely having an impairment does not make one disabled for the purposes of ADA. In *Toyota*, the Court held that 42 USC 12102(2)(a) requires demonstrated substantial impairment of a major life activity, and not the mere diagnosis or evidence of impairment (slip op 13 and 14). Thus, a worker whose workplace practices could be altered to reduce injury did not enjoy discrimination protections as a "disabled person" under ADA, because she did not suffer substantial impairment of the ability to perform one or more major life activities even though she suffered a documented case of carpal tunnel syndrome. Significantly, her case, had she succeeded, would have brought her monetary relief, not health care, to relieve her suffering. More significantly, from the standpoint of public policy and the practice of occupational medicine, nothing in ADA or the EEOC regulations there at bar would have mandated a change in workplace practices or procedures that would prevent her colleagues from suffering the pains of preventable injury.

A. Sound Occupational Medicine Practice May Require that Certain Individuals Avoid Certain Risks to Preserve Life, Health and Avoid Liability

Respondent Mario Echazabal began working at an oil refinery owned by petitioner Chevron U.S.A., Inc. in 1972. Employed by various contractors, respondent worked at different times for petitioner as a laborer, helper, pipefitter, and on the fire watch. Respondent worked primarily in the refinery's coker unit. Pet. App. 2a. In 1992, respondent applied to work directly for petitioner in the refinery's coker unit. Petitioner made respondent an offer of employment contingent upon his passing a physical examination. Said examination by petitioner's physician revealed that respondent's liver was releasing certain enzymes at a higher than normal level. Based on that examination, petitioner concluded that respondent's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. Petitioner therefore rescinded the job offer. Pet. App. 2a. After respondent consulted several doctors, he was diagnosed with asymptomatic, chronic active Hepatitis C, a viral infection of the liver. Pet. App. 3a, 35a. Respondent continued to work as an employee of petitioner's maintenance contractor. Id. at 2a. In 1995, respondent again

applied to petitioner for a position as a plant helper in the coker unit. Petitioner again made respondent an offer contingent on a physical examination. Pet. App. 3a, 35a. Petitioner's examining physician concluded that further exposure to chemicals and solvents like those used in the coker unit would seriously endanger respondent's health and, in certain circumstances, could be fatal. Id. at 38a; C.A. E.R. 81-82. Petitioner's medical director agreed that respondent could not work in the coker unit without risk to his own health. Pet. App. 38a. Based on the those findings, petitioner refused to hire respondent. Id. at 3a. Petitioner also instructed its maintenance contractor to ensure that respondent was not exposed to solvents and chemicals; and, as a result, respondent could no longer work at the refinery. Ibid.

Respondent brought an action in state court alleging discrimination on the basis of a disability that violated ADA. Pet. App. 3a. Petitioner removed the case to the United States District Court for the Central District of California. Id. at 32a. The district court granted summary judgment in favor of petitioner on all of respondent's claims. Id. at 32a-57a. On the ADA claim, the district court found that petitioner's refusal to hire respondent was lawful because, as a result of respondent's liver condition, his working in the refinery would have posed a direct threat to his health. Id. at 46a-52a. The district court stayed the proceedings against the maintenance contractor, and certified several issues for appeal, including the propriety of the grant of summary judgment on the ADA claim. Id. at 3a-4a. Because the risks are prospective, and speculative at best, and there is no substantial impairment of the ability to perform one or more major life activities, (*Toyota v Williams* _US__(2002) 2002 WL 15402(2002)) this individual can only enjoy ADA protection if this Court were to find that the protected worker suffers from stigma for illness that is "not manifest" (*School System School Bd. of Nassau County v. Arline,* 480 U.S. 273, 287 (1987) ("an individualized inquiry" protects disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear"). This determination is irrelevant, however, if the affirmative defense itself is invalid, as are the regulations at bar for the reasons set forth below.

B. ADA Does Not Address Issues of "Threat to Harm" That Impact Workplace Safety and Health

Cursory application of medical knowledge embedded in EEOC regulations cannot rise to the level of prospective, preventive

legislation that is the essence of the authority to protect the health and safety of all workers and provide "employment and places of employment that are free of recognized hazards" in the USA OSH Act Sec 5(a)(1), 29 USC 654(a)(1). In no case could ADA provide the risk assessment criteria or a statutory basis for prospective alteration of working conditions that could actually minimize risk or reduce the likelihood of injury or harm. As noted by Judge Trott in dissent in *Echazabal v Chevron* 226 F3d 1063 (2000) (dissent), "Our law books, both state and federal, overflow with statutes and rules designed by representative governments to protect workers from harm. Long ago we rejected the idea that workers toil at their own peril in the workplace....In many jurisdictions, it is a crime knowingly to subject workers to life-endangering conditions. California Labor Code S 6402 expressly forbids an employer from putting an employee in harms way. In Arizona, an employer who fails to provide a safe workplace commits a felony. Ariz. Rev. Stats. Annot., Labor S 24-403, S 23-418. In effect, we repeal these laws with respect to this appellant, and to other workers in similar situations. So much for OSHA. Now, our laws give less protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards." *Echazabal v Chevron,* 226 F3d 1063 (2000), Trott, J. Dissenting (Citations in original)

II. Government Authority Exists to Protect Health Without Reaching ADA's Civil Rights Issues

Judge Trott wisely asked in his dissent, "Did Congress really intend to nullify state and federal workplace safety laws and render them impotent to protect workers in identifiable harms way?" ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation." 42 U.S.C. 12111(3), without commenting upon the criteria for diagnosis or medical determination of the severity, prognosis or treatment of the disabling condition. When passing the ADA, the US Congress required the EEOC to issue regulations to carry out the provisions of Title I, and the EEOC, following public notice and comment has issued regulations pursuant to that mandate, 56 Fed. Reg. 35,726 (1991). Consistent with the statutory tex., the regulations provide that an employer may defend against a charge that a qualification standard improperly screens out a disabled individual by showing that the standard is "job-related and consistent with business

necessity, and such performance cannot be accomplished with reasonable accommodation." 29 C.F.R. 1630.15(b)(1). In elaborating on that defense, the regulations state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. 1630.15(b)(2). The regulations define direct threat to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

A. The Government's Obligation To Protect Health Has Primacy Under the Doctrine of *Parens Patriae.*

Public health preventive strategies typically categorize individuals in sub-groups according to risk in order to prevent avoidable or foreseeable harms. Under the doctrine of *parens patriae*, state and federal governments have consistently recognized the need on occasion to abridge or modify legal views of individual rights, in order to preserve the public health. Examples abound, including but not limited to: abrogation of privacy rights in order to collect and preserve personal data in vital records, (births, deaths and specified diseases); restriction of the person, quarantine; and restriction in the use of private property without constituting a "taking" in cases of zoning to prevent pollution or public nuisances. Grad, Frank P., *Public Health Law Manual*, Amer. Public Health Assoc. , Wash. D.C. (1990)

B. There is Precedent in the Federal Law Providing Special Occupational Health Regulations to Address Risk and Preserve Life Without Demonstrating Substantial Impairment or Qualification as "Disabled"

Federal law regulations already exist that divide groups of workers according to sub-populations. For example, the Nuclear Regulatory Commission (NRC) has different standards for workers under age 18 compared to other workers. NRC also instituted regulations with different standards for the general public, for exposed employees, and for "fetal exposure" in the event of so-called "declared pregnancy" Nuclear Regulatory Commission Regulations, 10 CFR Sections 19.12-19.32;20.1 et. seq.. U. S. Congress has also spoken to other important occupational safety and health issues: The Occupational Safety and Health Act of 1970 grants the Secretary of

Labor authority to protect workers "functional capacity" against "recognized hazards", including health hazards in the workplace and a host of compensation laws provide compensation for work-related disabilities, such as black lung and harms to federal employees. This Petitioner has not violated the relevant OSHA regulations, nor been cited by OSHA for unacceptable practices regarding health hazards. And, weaknesses in OSHA regulations or an agency's reluctance to grapple with these issues should not give rise to any inference that others hold the proper venue for regulating these important risks. Rather, there is ample authority under OSH Act for OSHA to play a more active role in this area.

One fundamental tenet of occupational medicine requires that physicians prevent harm, as exemplified by the ACOEM Code of Ethics. ADA has become the new mantra for occupational and environmental medicine practice, because it has revolutionized the workforce by making it illegal to exclude applicants who have disability or to ask about previous injury or illness experience, regardless of the cause of harm– whether from prior exposures in the workplace, leisure activities , sports or home. Feitshans, Ilise L. ; ACOEM Continuing Medicial Education (CME) Materials "Law and Ethics of Occupational and Environmental Medicine Programs (San Antonio 1999, Philadelphia 2000 and San Francisco 2001. Furthermore, determinations of access to medical records, transfer of information between employers and insurers, and relevant data regarding fitness to work are routinely trafficked trough the offices of occupational physicians. Their pivotal role in the employment process involves deciding on a daily basis, whether any job has too high a risk to be acceptable for any applicant's health. This raises difficult ethical questions, faced by many occupational physicians daily, because job hazards vary across worksites. Thus, the question whether a job is acceptably safe or too dangerous for the risks to be acceptable is a subtle and complex evaluation that can best be made by occupational physicians following OSHA regulations. On such matters, the best medical minds may disagree about the implementation of specific recommendations on a patient by patient basis, but none can escape their awkward position that places them on the horns of a professional dilemma: their medical opinion regarding the match between job applicant and placement in a particular assignment must be reasonable and justified when taking into account not only the social need for

preventing and ending workplace discrimination against disabled people, but also by examining scientific and medical parameters such as ambient exposures in the work environment; as well as job description, industrial category and individual variations in the response to risk.

Once the confluence of job hazard and individual risk is too great for them to ethically advise that person accept the work assignment, the occupational physician who signs off risks malpractice liability and fosters non-compliance with health laws; and the occupational physician who signs off on a refusal to hire or place the same person may unwittingly become a link in the chain of an employer's pattern of practice of discrimination. Therefore, acting with professional integrity for those who practice occupational medicine is fraught with personal and professional liability where there is no safe or neutral ground upon which they can confidently rest their opinion.

Thus, many physicians pro-actively foster the employment of workers against the employer's desire to reject them on grounds of ill-health that is awkward in the worksite although not so severe that it substantially impairs the performance of one or more major life activities. Such doctors have an ethical obligation to support a decision by an employer to deny assignment in cases of high risk and high probability of harm. See: Feitshans, I.L. Bringing Health to Work (1997) at 127-129. Examples include: disabled individuals who applies to an industrial firefighting and rescue brigade in an oil refinery and chemical plant, or people with asthma whose occasionally experienced bronchospasm made them ill-advised for firefighting; these cases present a situation where an individual should not be placed because of the risk of harm to oneself or others. In such contexts, there is a valid concern, as expressed by the medical director of the company was that the applicant was at high risk for getting into a situation that he could not get out of. Not only might his asthma be aggravated in an emergency situation with smoke and airborne irritant exposure, but his exercise capacity would drop abruptly and unpredictably and he could easily find himself trapped. Determining when such rare instances raise valid concerns, however, is not so easy in the daily practice found in offices of occupational physicians, where the rubber of implementation of ADA prohibitions against discrimination meets the road of commerce. Many lawyers and other professionals may subsequently second guess the decision of

occupational physicians, who err on the side of caution and desire to do no harm. This is where it is imperative, however, that the actual determinations about job hazard analysis be made by experienced medical staff who are bound by the personal liability of their standing as professionals, and where they be given the best scientific evidence in order to implement protective programs. In these instances, the US Congress spoke to three different agencies, the Occupational Safety and Health Administration (OSHA) the National Institute of Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Review Commission (OSHRC) two decades before it wrote ADA.

Fundamentally, the normal operation of a workplace should be governed by occupational health and safety standards. If a worker qualifies for the work under ADA, the proper rule governing their safety is occupational health regulations. ADA was also not intended to cover the situation when a worker belongs to a small subset of the general population with an uncommon health problem and by virtue of this problem is exquisitely more susceptible to injury than the majority of people. Occupational exposure limits are not set to take into account the tail of the curve or subsets of people who are more susceptible by orders of magnitude, but can be handled under standards recognized by the scientific community as reasonable and appropriate. The usual PEL may be expected to injure a very small fraction of the general population (e.g. the 90 dB TWA noise standard, with an 85 dB action level, is still associated with something on the order of 5% noise-induced hearing loss in occupations with consistently high noise levels approximating the PEL). Another common situation involves people who have become sensitized to workplace chemicals; the sensitization may occur well below the PEL and screening out workers by virtue of a history of allergies is not useful because their risk of becoming sensitized to any one exposure is only slightly higher than anybody else.

In such cases, the physician who overlooks medical criteria not contemplated by Congress within the four corners of ADA overlooks also the enforcement and threshold health requirements to provide "employment and places of employment that are free of recognized hazards", OSH Act 29 USC 654.

At the same time, certain types of illnesses that can be aggravated by workplace exposure may be clustered by genetic factors, race, family history, ethnicity or sex. Thus, sound medical reasoning

may not always comport with legal efforts to prevent discrimination, unless one completely overlooks efforts to prevent disability. Many of these conditions, however, have their greatest impact upon populations who face potential risk which can be minimized through sound industrial hygiene practice or engineering controls, custom tailored to meet the needs of the patient who is an applicant for employment. The solution, therefore, requires opening up OSH Act authority to promulgate health standards and enforce preventive regulations, which must be crafted with due regard to discrimination parameters. This does not, however, mean use of an affirmative defense by employers who are concerned about a risk of threat of harm to oneself, which ultimately would render unemployable, by definition, most people who are subject to special allergies or particularly vulnerable to opportunistic infections.

C. These Issues Will Emerge Again As New Technologies Uncover Risks and Propensities Using Genomic, Toxicogenomic, Protenomic Profiles and New Techniques of Medical Care

The laws of nature do not know legal boundaries drawn by humans. Some occupations necessarily require acceptance of unpredictable risk. For example, firefighters presenting to an occupational physician might require that the legal concept of essential functions of the job must include the capacity to perform in extreme situations. A second concern is that an unacceptable future risk of injury or death, even if the person can do the job under normal circumstances, must be ethically be viewed as a reasonable disqualification from the perspective of the physician who seeks to prevent harm. . When rooted in medical evidence that can be reviewed by peers or in cases of imminent danger, distinct risk factors can be distinguished from the circumstances where prejudiced views of tuberculosis that was in remission and was not a threat to others in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) ("an individualized inquiry" protects disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear"). There is no blanket judge-made rule, however, that can govern such situations, or to prevent a rule of caution from becoming a slippery slope that ultimately becomes arbitrary and capricious in its application, with discriminatory results.

This problem will become greatly exacerbated as the human

genome project uncovers the benefits of genetic testing in the workplace. Feitshans, Ilise L. GENETIC DESTINY: TODAY's LAWS, TOMORROW's TECHNOLOGY (MCLE for the Moseley Institute 1999); "Spider Silk Jeans or Spider Silk Genes: Genetic Testing in the Workplace"; New York Law School Journal of Human Rights, February 2002 ; Review of "From Chance to Choice: Genetics and Justice" *New England Journal of Medicine Sept 14 2000*. Genetic preconditions and other high-tech biological profiles cluster in families and thus are immutably linked to characteristics such as sex, race ethnicity or national origin, the use of which as criteria in employment might resemble prohibited demarkations for polices under the law of discrimination.

The "discrimination prohibitions" in OSH Act Sec 11 c 29 U.S.C. 661(c) has been interpreted by this Court to provide a right to refuse hazardous work in the face of imminent danger . This right applies without regard to race, sex, age, ethnicity or disability. But it does not on its face comport with the notion, articulated in IUAW v Johnson Controls as approved by the Ninth Circuit. Citing the *Johnson Controls-Dothard* precedents, the *Echazabal* court characterized these cases as standing for the proposition that "threats of lead exposure to female employees' own reproductive health did not justify the employer's decision to exclude women from certain positions at a battery manufacturing plant." It cannot make sense however, that Congress's decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk, it would enact legislation allowing the same freedom of choice to disabled individuals.

The specialized expertise of administrative standard setting and regulations is required to be even-handed while applying the best available scientific and medical evidence. Because such situations do not involve accommodation to a normal job, with static work requirements, and given that the worker is rarely disabled from activities of daily living or usual tasks in this situation, one could argue that it is not a situation ADA was designed to cover, but nonetheless an extreme case of the usual fitness-to-work requirement imposed by employers. It is at this commonplace point in the worksite, however, where the view of the majority can be synthesized with the view of the dissent, by taking judicial notice of OSH Act's vital role "to preserve

the health of working men and women and protect our Nation's human resources" in OSH Act's stated purposes.

As Judge Trott correctly noted in his dissent, "Because the job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him. To ignore this reality is bizarre"*Echazabal v Chevron*, 226 F3d 1063 (2000). Trott, J., dissent).

In the prior cases that visited this matter a decade ago, this Court ruled that fetal protection policies constitute prima facie discrimination, with the awkward result that employers are compelled to allow women into high risk workplaces, without the benefits of risk assessment, medical surveillance or other scientific evidence that health-related administrative agencies, can best review. Ruling otherwise would have required unduly stretching the narrow exceptions in Title VII, inconsistent with case law and its legislative history, and also without providing employers or employees the benefits of sound scientific evaluation of conditions on a case-by-case basis. Neither approach provided a viable solution to high-risk exposures that may affect men and/or women, or addressed posterity's need to protect fetal health. HR 4420, 101st Congress, 2d Sess., (1990) "The Employee Protection Act of 1990", introduced by Rep. Pat Williams, (D-Montana) Furthermore, each of those approaches is antithetical to good industrial hygiene practices or public health strategies. (outlined below).

In this regard, the Ninth Circuit Court of Appeals was correct to state that the US Congress, in writing ADA, deliberately parsed its language to express concern for a disabled person's risk of injury to others (as in the case of mental patients or people with contagious diseases) but not to harm to oneself, since the safety net for determining the acceptable level of risk in the workplace is determined by a pre-existing regulatory agency, OSHA, which has both the statutory mandate and regulatory history to promulgate and enforce standards that reduce risk. Armed with NIOSH research, OSHA has the power to alter working conditions. Such standards that are even-handed and applied in the workplace are subject to administrative and judicial review, having withstood the tests of OSHRC and this Court.

III. The US Congress Has Clearly Expressed Its Intention to Address these Issues

A. Legislative Intent Exists Jurisdiction Under OSH Act For OSHA, NIOSH and OSHRC to Promulgate Standards Using Their Expertise

Fortunately for the case at bar, the US Congress has spoken loudly and often on these subjects, with ample authority delegated to its agencies who have, in the nearly three and a half decades since the passage of OSH Act in 1970. Under this statute, there has developed a body of the requisite administrative expertise to approach these questions. Several principles of legislative drafting discussed by the Ninth Circuit Court of Appeals in the case at bar point to the seminal importance of this void in the ADA that Congress not only knew about, but had already filled under health law. Under OSHA regulations that already exist, however, if a worker can be proven to have a risk much greater than the average person at a given PEL, they should not be allowed to work in an occupation where the exposure may lead to this risk. The argument then becomes what risk is acceptable (>50%?) and is this a violation of the usual principle that we do not deny employment on the basis of future prognosis or risk, as in the case of hiring asymptomatic HIV-positive individuals or individuals with Hepatitis C?

This Court must therefore take judicial notice of the fundamental and inevitable character of the health concerns in the case at bar, and thereby determine that although an individual who is otherwise qualified for employment may nonetheless present too great a risk to oneself ethically, morally, or legally be placed in a toxic workplace, but that the proper agency to apply its expertise in making such a determination is the Occupational Safety and Health Administration that promulgates health standards under the OSH Act and which also has the authority to promulgate health standards, inspect, and enforce abatement of working conditions, rather than the EEOC that enforces the ADA.

B. Occupational Health Issues, Unlike Policies that Prevent Discrimination, Require a Careful Weighing of Epidemiological Evidence on a Substance by Substance and Worksite by Worksite Basis As Specific Job Hazards Impact Individual Employees.

Risk and the attendant effects of known or recognized hazards

encompass all agents which have an adverse effect health. Risk assessment attempts to describe the causal relationship between adverse effects and environmental factors such as chemicals, radiation, stress, and pathogens, Lowrence, W.W., *Of Acceptable Risk: Science and the Determination of Safety*, William Kaufman, Inc., Los Altos, Ca. (1976). Reliance is placed upon toxicological and epidemiological studies which relate specific agents to adverse outcomes. U.S. Congress, Office of Technology Assessment, *Preventing Illness and Injury in the Workplace,* Washington D.C. 1985, Ch. 3. The unprecedented scientific discoveries regarding medical treatment and the natural history of disease have caused an inevitable but useful overlap in the use of risk assessment in many areas of the law in recent years. See: Susan Rose and Tee Guidotti, Science on the Witness Stand, OEM Press Mass. 2001, in particular Chapter 17, Ilise L. Feitshans, "Evidentiary Standards in Occupational Health Law".

The objective of risk assessment is not simply to identify a connection between a hazardous agent and an adverse effect. Exposure to the agent must be quantified in the form of a measurable index such as air contaminant concentration, absorbed dose, or blood chemistry. Sound industrial hygiene practice recognizes a hierarchy of controls to reduce or eliminate workplace hazards, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC 1985, Ch.3. The preferred approach, where feasible, is to redesign a work process to eliminate or reduce hazards by substituting materials, curtailing harmful emissions, or isolating the worker from the hazardous process.

As noted by Former Secretary of Labor for OSHA, Dr. Morton Corn, the nature and severity of effects is characterized at varying levels of exposure, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch.3. Previous attempts by EEOC to provide meaningful criteria in areas of health law have proven to be inadequate. For example, on October 3, 1988, the EEOC issued a Policy Statement on Reproductive and Fetal Hazards Under Title VII, "Policy Statement on Reproductive and Fetal Hazards Under Title VII" *Fair Employment Practices Manual (BNA)* 401:6013. The EEOC criteria for a fetal protection policy, as restated by the Court of Appeals in *Wright v Olin* 697 F2d 1172 (1982) can be summarized as: (1) substantial risk of reproductive harm; (2) risk via exposure of one sex but not the other sex; and (3) ability of the policy to eliminate risk,

IUAW v. Johnson Controls, 886 F2d 871 at 886. These criteria do not reflect the quantitative aspect of scientific risk assessment, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC 1985, Ch.3. Furthermore, risk assessment could not be easily reviewed by a court without prior administrative review by an agency that has expertise in the application of scientific evidence to occupational health criteria. Using the results of such analysis without considering the scientific context in which they were developed could cause equal or greater harm than the risk to be avoided. Application of industrial hygiene controls would constitute such an alternative, but could not be easily evaluated by an administrative agency that is not familiar with issues of occupational safety and health.

The next option is work practice controls, which involve training employees to work more safely, or administrative controls, which limit the duration of an employee's exposure. Using exposure monitoring, medical surveillance and enhanced industrial hygiene controls, it is possible to create alternatives for control. A final resort is the use of personal protective equipment such as respirators. The rationale for this hierarchy is a preference for the most reliable method among feasible controls, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch. 9.

The ability to implement any good industrial hygiene program depends upon the hygienist's ability to tailor required programs to the substances, exposures and working population in a given workplace, *Id.* Feasibility depends upon the configuration of the workplace; the cost and availability of necessary technology; the effectiveness of worker training; and the willingness of the employer to commit resources toward developing new control technology, *Id.* Recognizing that the feasibility of controls is not a static parameter, men and women have occupational exposure to a variety of job specific risks would be enrolled in programs that meet their individual needs.

C. EEOC Lacks OSH Act 's Delegated Authority and Expertise To Determine Individual Risk at Work

ADA's theoretical antecedent, as cited in its legislative history is Title VII of the Civil Rights Act of 1964 42 USC S 703. Under Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate

invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Dothard v. Rawlinson* 433 U.S. 321, at 328 (1977). In *International Union of United Auto Workers (IUAW) v. Johnson Controls*, 886 F2d 871 (7th Cir. 1989); 499 US 202 (1991) this Court ruled that any Fetal Protection Policy constitutes *prima facie* discrimination in violation of Title VII, because it prohibits employment of fertile women in high-exposure jobs in lead battery production. It was undisputed that lead is one of the most dangerous environmental toxins and that transplacental transfer of lead in a pregnant woman to her unborn child can cause a significant risk of damage but discrimination analysis mandated that women be allowed to work, without the benefit of medical surveillance, scientific criteria regarding risk or risk assessment reflected in the best industrial hygiene, occupational medicine practice or engineering controls.

It cannot be, however, that this Court or Congress intended a result that does not limit individual harm without regard to the independent views of regulators and occupational physicians. Any level of risk from exposure that prevents an exclusionary policy, regardless of its harsh working conditions, or the large class of workers that are affected by it, could be justified under this view. In the case at bar, there is no evidence that the risk respondent allegedly poses to his own health renders him unable to perform his job. But, if applied here, the Johnson Controls criterion will foster an approach that will allow all workers to obtain employment without regard to particular high-risk exposures. This approach runs the greater risk of paying nominal deference to discrimination concerns, without guaranteeing adequate industrial hygiene protection; it therefore is antithetical to good industrial hygiene practices and sound public health strategies.

All work has risks. As Chief Justice Burger noted in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980), there is no such thing as a "risk-free" environment. Thus, when writing ADA, Congress wisely looked to the notion of undue hardship when a disabled person's illness presents a risk of harm to others, as in the case of unmanagable mental illness or communicable disease, but wisely made the deliberate choice to exclude criteria that would address the notion of risk of harm to oneself, lest this frustrate the purposes of OSH Act.

Since all work has risks, all disabled people who work would,

by definition, face a risk of harm to oneself by working. As in the fetal protection cases, a blanket determination that employers independently may determine the risk undertaken by each individual without a regulatory standard to guide them leaves two nagging questions at each of the policy's logical extremes: (1) what minimum requirements for demonstrating to the court that an exclusionary decision, in lieu of alternative protections, is justified? and (2) which circumstances place limits on the level of risk involved, to determine when an job's hazards and attendant risk goes too far?. Leaving such constructs at the discretion of the employer would, by definition, make it possible for employers to include a class of applicants among the disabled and then draw job descriptions that feature undue burdens of risk, thereby excluding them from the actual workforce and granting jobs only to healthy applicants and healthy workers. This "harm to oneself" affirmative defense therefore gives no blueprint for drawing a distinction between impermissible harms that threaten workers' health, but must be corrected immediately through engineering controls, in contrast to cases where the employer's policy can be justified, although discriminatory in its effect. More importantly, this standard does not place a clear limit on employer policies that may unfairly harm workers, even though such outcomes may breach an employer responsibility to protect workers.

IV. Conclusion.

A. EEOC's "Threat of Harm to Oneself" Regulation Is Ultra Vires and Therefore Invalid

When there is a high probability that an employee will suffer significant injury or death in the near future because of his performance of the job, there is risk that the employee will miss work due to injury with attendant unnecessary costs and disruption for all parties. As both the Solicitor General and the Amicus ACOEM, noted, losses in efficiency and productivity due to the disruption of its operations and the need to find a replacement and retrain a new worker, Citing Rosenstock and also Haig Neville, 40 Industrial Management, Workplace accidents: they cost more than you think 7 (Jan.-Feb. 1998) (workplace injuries have "immeasurable costs of lost production and efficiency on a company-wide basis")(Brief of Amicus ACOEM and Brief of Solicitor General of the US).

The Ninth Circuit Court of Appeals correctly applied the canon of statutory construction ***expressio unius est exclusio alterius***.

The court reasoned that the statutory specification of a "direct threat" defense for the risk of harm to others implicitly precludes a direct threat defense for the risk of harm to self. See Pet. App. 6a-7a. The court of appeals' reliance on the ***expressio unius*** principle was appropriate because the relevant statutory language is found in another law, OSH Act. It is deceptively easy to overstate the EEOC's expertise in this narrow and carefully defined area of medicine as it is currently practiced under USA law. Although it is correct that ADA's legislative history does not foreclose a threat-to-self defense", the true and correct repository for administrative review of these decisions lies with the Occupational Safety and Health Administration (OSHA) as established along with two other agencies, the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Review Commission (OSHRC). The Chevron decision would support the rule of reason that Congress has clearly and directly articulated its desire to delegate this authority not to EEOC but another agency, OSHA, under the OSH Act, which was written two full decades before the passage of ADA and was doubtlessly well known to the sitting members of Congress.

Even though the precise solution to these problems is not found within the four corners of the ADA, the US Congress has not been silent about important questions of occupational health policy. The legislature had no need to address this question when writing ADA, having spoken before through the OSH Act. Thus, EEOC's over-reaching in this area of regulation exceeded the scope of its statutory mandate and violates the delegation doctrine. Its rules that are written beyond the scope of this authority are ultra vires and are, by definition, invalid.

In *Whitman, V. American Trucking Associations, Inc.*, 531 US. 457 (2001) the US Supreme Court confronted for the first time in over half a century the issues surrounding delegation of authority by the US Congress to administrative agencies *Whitman, V. American Trucking Associations, Inc.*, 531 U.s. 457 (2001). Jurisprudes everywhere in the USA breathed a sign of relief as the US Supreme Court held that Clean Air Act's delegation of authority to Environmental Protection Agency (EPA) to set national ambient air quality standards (NAAQS) at level "requisite to protect public health" was not unconstitutional delegation of legislative power under the Clean Air Act (CAA) Clean Air Act, 172(a)(1)(C), (a)(2)(D), 181(a), as amended, 42 U.S.C.A. ' 7502(a)(1)(C), (a)(2)(D), 7511(a) In 1990,

over 600 pages of Congressional legislation set forth amendments to Clean Air Act. The complex provisions were criticized at the time of their writing as an undue exercise of oversight capabilities by the US Congress, who had authority but lacked the expertise to understand the subtle but important ramifications of the legislative text as it attempted to write law governing science. Significantly, the law was written at the same time as ADA, demonstrating once again that had the US Congress wished EEOC to exercise such medical and scientific expertise as required to develop and enforce health standards at the workplace, the US Congress would have done so. Such microscopic scrutiny of Congressional regulations for health applying scientific principles and the experience of environmental medicine under Clean Air Act (CAA) Clean Air Act, ' 307(b), as amended, 42 U.S.C.A. ' 7607(b) upheld the Environmental Protection Agency's (EPA) implementation policy for revised national ambient air quality standards (NAAQS) for ozone in "nonattainment". *Whitman* shows once again that the US Congress knew, understood and actually has employed highly technical scientific language when drafting statutes if it so desires for the statutes to address health issues. By 1990, Congress had spoken about many questions of law, health policy environmental health and occupational medicine.

This Court based this crucial finding on the principle that "in a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, ' 1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." . This Court repeatedly has said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, (1928). , see, *e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, (1935). Whether the statute delegates legislative power is a question for the courts. When invalidating the EEOC's regulations, the Ninth Circuit stated that, when the term "direct threat" was used in the "various committee reports" and "floor debate," there was no explicit reference to "threats to the disabled person himself." Pet. App. 7a-8a. "For example," Senator Kennedy explained, "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed." Ibid. But this does

not make occupational health sense. Fortunately, "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," Solicitor General citing Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979). Short of speculative determination of prospective risk, this analysis requires more detailed expertise in medicine and occupational health than a EEOC is authorized to possess.

It does not matter therefore that ADA did not expressly address the special risks of disabled individuals, because Congress has removed those questions from the realm of EEOC and into labor relations between employers and individuals. Instead, OSHA has enforcement authority to inspect and require modifications of working conditions under OSH Act that will abate hazards and render a safer and healthier workplace for all employees. EEOC regulations correctly prohibit employment decisions based on "[g]eneralized fears about risks from the employment environment." 29 C.F.R. Pt. 1630, App. § 1630.2(r); see also 29 C.F.R. Pt. 1630, App. § 1630.15(a). But this situation sits on the border between "generalized fear" and sound medical insight, which will vary on a case-by-case basis involving an assessment of job hazards, attendant risks and the natural history of disease after diagnosis.

B. This Court Should Issue a Writ of Mandamus Requiring the Secretary of Labor for OSHA to Promulgate Regulations About Disabled Workers

OSH Act's expressly written realm of expertise was envisioned by the US Congress two decades before it wrote the ADA. OS H Act requires that OSHA " 'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health' "--which the Court upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646, (1980), and which then- Justice Rehnquist, in that case thought the statute violated the nondelegation doctrine, see id., at 671, 100 S.Ct. 2844 (opinion concurring in judgment) . The Occupational Safety and Health Act prohibits employers from exposing employees to "recognized hazards" that are likely to cause "death or serious physical harm," and imposes a "general duty" to furnish a safe workplace. 29 U.S.C. 654(a)(1). OSHRC enforcement procedures also recognize the implicit limit on employer responsibility in this regard, by offering the "Employee

Misconduct" defense to employers who demonstrate that their safety and health rules were violated and by requiring that all employees follow workplace safety and health rules in OSH Act Section 5 (B).

For this reason, it does not matter whether this Court finds that respondent is a "qualified individual" under the ADA. As a threshold matter, an individual poses a direct threat, the regulations require the employer to consider "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. 1630.2(r). The regulations require that those factors be assessed "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence," ibid., and "not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes," 29 C.F.R. Pt. 1630, App. § 1630.2(r). The regulations merely require an employer to conduct an "individualized" and "objective" assessment of whether the individual's performance of the job raises a "significant risk of substantial harm to the health or safety of the individual." 29 C.F.R. 1630.2(r). EEOC regulations are thus superficial and cannot reach the hard scientific issues of in which OSHA, NIOSH and OSHRC have decades more administrative expertise. The Ninth Circuit correctly held that the ADA does not provide an affirmative defense permitting an employer "to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety." , finding language of the ADA "dispositive" of that question. Congress, two decades before the passage of ADA recognized that ensuring worker safety reduces injuries and the resulting absences of critical employees. Such over-reaching cannot be entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Public awareness of occupational health concerns aided by stronger enforcement of OSH Act would effectively address these issues. OSHA and its sister agencies were delegated authority by the US Congress to develop expertise and promulgate health standards, two decades before the passage of the ADA. Plaintiffs in discrimination cases can enjoy financial rewards if they win, as they did in Johnson Controls, which are not available to those who prevail in OSHA enforcement actions. Although weak, the preventive powers embedded in OSH Act remain the injured worker's best friend.

Furthermore, the OSH Act is the only statute that creates an agency with the expertise to prevent harms prospectively. Even though the OSH Act statute suffers from its almost castrating weakness of disempowering individuals, because unlike discrimination laws, there is no individual right of action, only OSH Act can alter the course of actual working conditions that are linked to injury and harm. To realize this Congressional goal requires rethinking our priorities and approaches to occupational health in relation to other areas of preventive policy and employment-based medicine, but does not require rewriting our statutes as set forth by the US Congress or using band-aid approaches to craft a saving clause where legislation deliberately ends.

Understanding the pivotal role of occupational health laws also requires educating labor organizations to understand that not every harm is a form of discrimination. Applying OSH Act enforcement and the training programs may ultimately have been a better use of legal talents and of corporate resources, because only OSH Act and not ADA can make employers implement the programs that prevent the harms of carpal tunnel syndrome, excposures that uniquely confront the most vulnerable and sensitive workers, or other workplace exposures to risk of harm.

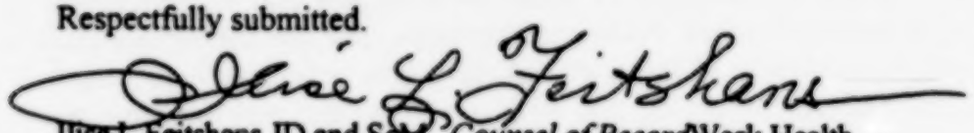
Employers have a legitimate interest in preventing workers from taking jobs that have a high probability of causing injury to themselves. Employers therefore have a right to protect themselves against avoidable workers' compensation and health care-related costs of retraining and substitution. But, there will be some cases for which regulatory medical protection must be imposed in order to avoid a slippery slope in which the susceptible or disabled would feel obliged to take any job, unable to refuse reassignment to a job that was uniquely dangerous to them without losing their employment. The US Congress has, in OSH Act and many other statutes, already struck the balance favoring prospective measures that protect health when confronted with these questions. The fact that few people like OSH Act's inartful statute does not render legitimate a set of regulations from another agency that acts beyond the scope of its own delegated authority making rules in OSHA's stead

CONCLUSION

The judgment of the court of appeals should be upheld regarding its determination that EEOC regulations allowing an

affirmative defense to discrimination claims based on "threat of harm"to oneself are invalid. A Writ of Mandamus is requested, requiring the Secretary of Labor for OSHA to promulgate standards that will address the needs of disabled individuals in the workplace.

Respectfully submitted.



Ilise L Feitshans JD and ScM *Counsel of Record*Work Health and Survival Project
The George Washington University
School of Public Health Services
The Warwick Building Washington, D.C. 20530-0001
phone:856 428 0605

CERTIFICATE OF SERVICE

A true and valid copy of this Brief Amicus Curiae has been served by certified mail to all parties in this proceeding

Ilise L Feitshans JD and ScM *Counsel of Record*

(over to next page for appendix One)

Appendix 1. Text of the ACOEM Code of Ethics

This code establishes standards of professional ethical conduct with which each member of the American College of Occupational and Environmental Medicine (ACOEM) is expected to comply. These standards are intended to guide occupational and environmental medicine physicians in their relationships with the individuals they serve, employers and workers representatives, colleagues in the health professions, the public, and all levels of government including the judiciary.

Physicians should:

1. Accord the highest priority to the health and safety of individuals in both the workplace and the environment.

2. Practice on scientific basis with integrity and strive to acquire and strive to acquire and maintain adequate knowledge and expertise upon which to render professional service.

3. Relate honestly and ethically in all professional relationships.

4. Strive to expand and disseminate medical knowledge and participate in ethical research efforts as appropriate.

5. Keep confidential all individual medical information, releasing such information only when required by law or overriding public health considerations, or to other physicians according to accepted medical practice, or to others at the request of the individual.

6. Recognize that employers may be entitled to counsel about an individuals medical work fitness, but not to diagnoses or specific details, except in compliance with laws and regulations.

7. Communicate to individuals and/or groups and significant observations and recommendations concerning their health or safety.

8.Recognize those medical impairments in oneself and others, including chemical dependency and abusive personal practices, which interfere with ones ability to follow the above principles, and take appropriate measures.